IN THE HIGH COURT OF JUDICATURE
ANDHRA PRADESH
AT HYDERABAD

THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO

WRIT PETITION NO :23585 of 1996

-

-

-

Dated: 19th September 2007.

-

Between:

Gandamanu Lakshminarayana, son of Appa Rao, aged about 38 years, Hindu, Snail Business and resident of Rest House Road, Bhimavaram, W.G.District and others.

..... PETITIONERS

AND

The Sub Divisional Magistrate, Narsapur, W.G.District and others.

.....RESPONDENTS

THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO

-

W.P.NO.23585 OF 1996

ORAL ORDER:

The writ petitioners are all carrying on trade and business in snails at Bhiavaram in West Godavari District. The Municipal Commissioner, Bhimavaram Municipality, Bhimavaram, seems to have lodged a complaint before the Executive Magistrate/Sub Divisional Magistrate, Narspur, alleging that the writ petitioners are encouraging the snails to be caught and they are extracting the snail flesh and leaving the shell on the bunds of the various canals and water bodies. The citizens of the locality concerned have been constantly complaining for not only the foul smell emanating from the remnants of the shells, but they are also complaining of the great inconvenience felt by the pedestrian users, who are finding it difficult to walk freely without stamping on the shells of the snails, which are hurting them in the process. This apart, the Municipal Commissioner has also alleged that the Public Health Authorities have found the waters in the canal system and various other water bodies being contaminated and the reasons for the contamination is attributed to the portions of snail flesh left behind un-extracted in the shells, which is getting into the water bodies leading to its putrefication and the consequential contamination of the water therein. The local Municipality got alarmed by the water borne

diseases faced by the citizens, as the water bodies are their main source of water supply. In this view of the matter, the Sub Divisional Magistrate, Narsapur, passed orders on 18-09-1996 directing the petitioners herein to stop purchasing and selling of snails and also to stop dumping of snail shells on the road margins, canals, rain bunds, etc. He had also directed, by the same proceedings, the appearance of the respondents on 23-09-1996, if they prefer to defend the case. There is no material forthcoming as to whether the order passed by the Sub Divisional Magistrate, Narsapur, on 18th September 1996, has been served on all the snail traders shown as respondents in the said case, by 23rd of September 1996, but however, the petitioners herein have entered appearance in the matter and filed a detailed counter on 31st September 1996. They contested the veracity of the statements of allegations leveled against them. But however, the Executive Magistrate had passed a detailed order under Section 136 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') on 27th October 1996 directing the respondents before him to stop the trade of snails.

The main contention of Sri O. Manohar Reddy learned counsel for the petitioners is that after passing a preliminary order on 18th September 1996, in terms of Section 133(1) of the Code, the Executive Magistrate, could have passed orders under Section 136 of the

Code, only if the persons to whom orders under Section 133(1) are issued, does not perform such act or appear and show cause. But, in the instant case, the petitioners have shown cause on 30th September 1996, by which date, the Executive Magistrate, had not passed the final orders under the proceedings. He passed the final orders only on

27th October 1996, by which time, there is already a statement before him on behalf of the petitioners herein disputing the veracity and tenability of the allegations leveled against them by the Bhimavaram Municipality. Therefore, the procedure contemplated under Section 138(1) of the Code should have been followed and the Magistrate was required to take evidence in the matter as in a summons case and consequently, ought to have followed the procedure prescribed in Section 254 of the Code and conclude the issue one way or other. Since the impugned order has been passed without following this procedure, the learned counsel submits that the order is illegal. Per contra, the learned Government Pleader would contend that within the time limit specified by the Executive Magistrate, in his preliminary notice issued under Section 133(1), if the petitioners have failed to show cause and abate the nuisance as is ordered to be done so, they forfeit their right to seek further evidence to be adduced in the matter in terms of Section 254 of the Code.

I am afraid, the contention advanced on behalf of the learned Government Pleader is not right. It will be appropriate to notice that Chapter X of the Code had provided for the maintenance of public order and tranquility. In Chapter X appears Section 133, which is intended to repose with the District Magistrate or a Sub Divisional Magistrate or any Executive Magistrate, who has been so specifically empowered by the State, on receiving a report of a Police Officer or other information, to order for removing any such obstruction or nuisance or to desist from carrying on or to remove or regularize in such manner as may be directed such trade or occupation or to remove such goods or merchandise or to regulate the keeping thereof in such a manner as may be directed. This is an extraordinary power, which has been conferred upon the Magistrate for the purpose of securing the immediate abatement of the public nuisance. But, nonetheless, a show cause notice is contemplated to be issued on the person against whom an order is sought to be made. Section 134 of the Code provides for service of such orders. If the person does not show cause or appear, as was noticed supra, the consequences for such action on his part are contemplated under Section 136 of the Code. On the other hand, Section 138(1) has specifically provided that if the person, against whom an order under Section 133 is made, appears and shows cause against the order, the Magistrate shall take evidence in the manner of a summons case. The Code

of Criminal Procedure has not left any discretion in the hands of the Magistrate, once the party enters appearance and contests the veracity of the imputations alleged against him. Section 138(1), therefore, obligates the Magistrate to take evidence as is done in a summons case and Chapter-XX of the Code has provided the procedure to be followed for trial of summons cases of Magistrates. Section 254 obligates the Magistrate to proceed to hear the prosecution and take all such evidence as may be produces in its support and also to hear the accused and take all such evidence as he produced in his defense. Thus, there is no scope that has been left behind for the Magistrate to dispense with this procedure contemplated when Sections 138(1) and 254(1) of the Code are read so together.

In the instant case, the Sub Divisional Magistrate-respondent herein, had passed orders under a mistaken impression that the petitioners herein have failed to respond to his preliminary order passed in terms of Section 133(1) of the Code and that is the reason why he invoked the power available to him under Section 136 of the Code. In fact, a Division Bench of this Court, which considered a similar issue in KRANTI PARCEL SERVICE, TUNI v. STATE[1], had concluded the same in the following manner.

> " 7. The Bombay High Court in State of Maharashtra V. Hassanali Vali Mohammed (1) 1975 Crl.L.J. 1782

held that it is imperative for the court to record evidence in the matter under Section 137 of the Old Code, which is equivalent to Section 138 of the New Code. As the Magistrate has not recorded evidence at all either on behalf of the original applicant or on behalf of the respondent-accused, his order making preliminary order absolute is bad in law. Jillai Bhaskaran Nair v. Varghese Samuel (2) 1875 Crl.L.J. 104 was considering the scope of Sections 136 and 137 of the Old Code. In para-4 of its Judgment, it observed as follows:

> " If the person against whom the show cause summons is served, appears and filed objections, the Magistrate should not dispose of the case under Section 136 but should take evidence and satisfy himself that the order passed by him is reasonable and proper. Even in cases the person concerned does not pursue his objections, the complainant should lead evidence on his side and should not leave the Magistrate to base his order on materials placed before him when the preliminary order was passed. Neither the reports of the Tahsildar nor police papers relating to the case nor evidence produced while passing order under Section 133 are substitutes

> for the taking of evidence under Section 137."
>
> Thus it is evident from the principle laid down in the above Judgment and on a reading of sub-section (1) of Section 138 of the New Code, it is imperative for the learned Magistrate to record evidence after the respondents are appeared in pursuance of the show-cause notice issued under Section 133 of the Code. In the present case no evidence is recorded and the Sub-Divisional Magistrate has made the preliminary order absolute without recording any evidence. Therefore, the impugned order in M.C.No.30/95, dated:1-9-1995 is quashed. However, the Sub-Divisional Magistrate is permitted to issue a fresh notice and record evidence and proceed further in accordance with law."

In view of the law laid down by the Division Bench of this Court and in view of my finding that the Sub Divisional Magistrate had proceeded on a misconception of fact that the petitioners herein have not shown cause to his preliminary order passed under Section 133(1) of the Code, I *set aside* the impugned order dated 27th October 1996, remitting the matter back to the Sub Divisional Magistrate, Narsapur, to conduct the trial duly recording the evidence on behalf of the local Municipality, Bhimavaram and also give a fair and reasonable opportunity to the petitioners herein to lead evidence as

is considered appropriate by them and then consider the entire matter on merits and pass a speaking order. This entire exercise, be completed within a period of six months at any rate before the end of 30th April 2008.

With this, the writ petition stands disposed of. No costs.

---

Nooty Ramamohana Rao, J

19th September 2007
mrk

---

[1] 1996(4) ALD 807 (D.B.)